

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF TEXAS
3 AUSTIN DIVISION

3 THOMAS C. SISOIAN) Docket No. A 14-CA-565 SS
4)
4 vs.) Austin, Texas
5)
5 INTERNATIONAL BUSINESS)
MACHINES CORPORATION) July 12, 2017
6

7 TRANSCRIPT OF STATUS CONFERENCE
8 BEFORE THE HONORABLE SAM SPARKS

9 APPEARANCES:

10 For the Plaintiff: Mr. Gabriel R. Gervay
11 Ms. Nicole E. Glauser
12 DiNovo, Price, Ellwanger & Hardy
13 7000 North MoPac Expressway,
Suite 350
Austin, Texas 78731

14 For the Defendant: Mr. Collin J. Cox
15 Mr. Christopher R. Johnson
16 Mr. R. Paul Yetter
17 Yetter Coleman
909 Fannin, Suite 3600
Houston, Texas 77010

18 Court Reporter: Ms. Lily Iva Reznik, CRR, RMR
19 501 West 5th Street, Suite 4153
20 Austin, Texas 78701
(512)391-8792

21
22
23
24
25 Proceedings reported by computerized stenography, transcript
produced by computer.

1 THE COURT: This is 14-CV-565, Sisoian vs.
2 International Business Machines Corporation.

3 I'll take the announcements.

4 MS. GLAUSER: Good morning, your Honor.

5 Nicki Glauser and Gabriel Gerverey on behalf of Sisoian.

6 THE COURT: Okay.

7 MR. COX: Good morning, your Honor.

8 Collin Cox, Paul Yetter, and Chris Johnson for IBM.

9 THE COURT: All right. Y'all have been going through a
10 lot of lawyers, I was noticing. Usually the machines allow
11 lawyers to withdraw, and that's because this is a case, as I've
12 indicated to you before, needs to be settled. So apparently
13 y'all haven't listened to me. As I tell those four sons of mine,
14 and they're all 50 or more, it's important to listen to me.

15 The main thing is, if that October docket doesn't break
16 down, you're not going to trial, and it goes to the -- there's
17 two ways that I do it. I've only had to do it four times in 26
18 years. I can put a case on the bubble and you go month to month
19 to month until I can fit it in; or I give you a concrete setting
20 in 2019 where you get a real good judge. Because I'm 77, I don't
21 know that I'll be -- want to do this in 2019.

22 Austin has the heaviest civil docket in the country and
23 two judges. We're supposed to have six, we're supposed to have
24 six eight years ago, but the Congress just doesn't see that. And
25 my young partner, Judge Yeakel's only 72. So we're handling best

1 we can. We were handling it a lot better when the Congress gave
2 us money and we could bring in judges because we've got
3 courtrooms and we were being able to handle our business.

4 But as you can see right now, nothing is happening in
5 the Congress, including funds to the judiciary. We can't even
6 hire anybody at this point in time. I heard this morning, in all
7 probability, they're going to close the government down, and this
8 time, they're going to make the Democrats do it because they're
9 going to propose a bill that builds the wall and so, the
10 Democrats will look bad. I don't know how either party can look
11 worse than they have, but I'm not political, so I didn't say.

12 So where are you on settlement?

13 MS. GLAUSER: Your Honor, pursuant to the Court's
14 order, plaintiff has made a new settlement demand, IBM has made a
15 counteroffer, but the parties have not reached agreement and it
16 doesn't appear as if they're close to agreement.

17 THE COURT: All right. Well, let me help you. I think
18 the plaintiff has a sorry case. You've got limitations I'm going
19 to have to decide in trial. You've got a long period of time.
20 And I have read all of these expert motions not to have them
21 testify. I'm in the process of reading the plaintiff's. On the
22 other hand, seems like I've had two cases like this in the last
23 16 months where the damages are exactly how the plaintiffs are
24 doing it with the owner and a mathematician. I have not let
25 either testify in either case, and the cases were settled while

1 the jury was out. But the damage issue is out. And in both
2 cases, the damages were 12 to \$20 million.

3 So you've got some problems. You've also got problems
4 in if I try this case, you're going to have four days, and in
5 that four days, because of the volume of work we have -- I've got
6 11:00, I've got a 2:00, I've got a 4:00. I'm sentencing 21
7 people on Friday. Tomorrow is just like this. When we have a
8 week off, we are loaded up with the motions.

9 But I learned a long time ago, on the motions to
10 exclude expert opinions, I do it at trial. It's worked out fine
11 because it requires a real dedicated reason, if you want to bring
12 it up, you bring it up, I excuse the jury, I listen to the
13 testimony, I will make a determination if the witness will
14 testify or what he will or she will testify about. You'll have
15 your record and the loser gets the time.

16 And I have found that it cuts the motions to exclude 80
17 percent because most motions to exclude just require good
18 cross-examination, and that's one of the ways I look at it. How
19 would I cross that witness and what are the weaknesses of it?
20 But I'll be prepared and I will be dismissing all of these
21 motions without prejudice to re-filing during trial.

22 So you don't know what witness you're going to have.
23 It's another reason to think about settlement. But the main
24 reason is, you know, time and I will do my best. I think it's a
25 fun case to try, actually. The money cases with the banks, the

1 money cases with the class-action cases with the SEC, they're
2 just pains in the rear, but this is a fun case to try. So I
3 would like to try it if I had that opportunity.

4 I'd like to try it and give you all the time in the
5 world because I think it's going to be interesting. But that's
6 what we're doing. If we go to trial, you're still the fourth
7 case and Professional Liability Insurance Services, Incorporated
8 vs. United States Risk is the one I was just saying that has
9 those books this big, 16 of them. My guess is the motions for
10 summary judgment will not be granted. It's a dilly.

11 Then Trust Bank of New York Mellon, if y'all were here,
12 you already heard that case. I don't think that's going to be a
13 big one. Lawrence vs. Aetna, you just heard, hopefully they will
14 get some sanity. And I have one class-action case -- actually, I
15 have two-class action cases, but one of them is Fair Labor
16 Standards Act, so I don't think it's going to take that much
17 time. The other one might well take time. I don't know how to
18 fit it in. So that's where we are.

19 My guess is you ought to look -- you've got Mr.
20 Sisoian, I guess he's still working for IBM?

21 MR. COX: He's not, your Honor.

22 THE COURT: Okay. Well, he lasted longer than I
23 figured. And y'all know what's going on a lot better than I.
24 But I purposely have held up on limitations, I think that's a
25 real issue problem that I will determine probably at the motion

1 for judgment.

2 So, let's see here, we're going to start off -- I'm
3 going to try to start you off on ten hours a side. Most of my
4 bigger cases are tried with ten hours. On complicated patents
5 cases -- in 1991, I never tried a patent case. I tried cases
6 from New York to Los Angeles, mostly on the clock, mostly in
7 federal court. The patents threw me because the lawyers were
8 engineers and then, they took long. The first one was three
9 weeks long, which was longer than any case I'd ever tried.

10 And every Friday, the jury would write me a letter,
11 every single juror: We do not understand anything going on in
12 the case. And I would read that letter to the jurors -- I mean,
13 to the lawyers and didn't seem to -- so by '92, I limited them to
14 eight claims. And the complicated cases, we selected a jury on
15 Monday, they went Monday, Tuesday, Wednesday, Thursday, Monday,
16 Tuesday, Wednesday to the jury, and that's been the way it has
17 been since '82.

18 Tried a lot of patents cases. The lawyers have helped
19 me because they know that's what's going to do. And we've been
20 able to move our dockets because it's a parallel docket from this
21 one. I have a special master that has to do the Markman hearing,
22 and then, I have to fit them in. So it's a difficult thing.

23 So ten hours is selection of a jury on Monday and
24 you'll be getting the case to the jury Thursday, hopefully
25 morning, but Thursday afternoon for sure. It has benefits. You

10:47:17 1 get a better jury. They come in here and I tell them they're
10:47:22 2 going to be here for five weeks, well, I've already advised them
10:47:25 3 of that by letter. You get -- you know, you get a lot of
10:47:36 4 excuses.

10:47:36 5 And Austin has an incredible -- of course, it's 16
10:47:40 6 counties around here, but mostly Austin, San Marcos and
10:47:45 7 Georgetown area. But I'll have eight or nine people that hold
10:47:51 8 patents in the jury pool, which kind of makes it easier for those
10:47:57 9 folks to -- if they can't strike them all, they do settle it
10:48:01 10 pretty quickly sometimes.

10:48:07 11 How about the jury of seven persons with four strikes,
10:48:12 12 with a stipulation which the rules say a verdict of five?

10:48:19 13 MS. GLAUSER: I believe plaintiff will be able to
10:48:21 14 stipulate to that.

10:48:22 15 MR. COX: Your Honor, sounds good to us. We'd just
10:48:24 16 like a chance to check with IBM, but we'll do that promptly.

10:48:28 17 THE COURT: Good. Send me down there. I haven't heard
10:48:31 18 anything from the magistrates. This is a case I really can't
10:48:39 19 give my magistrates because it's too big, too voluminous for them
10:48:45 20 to prepare. They have to go alternate weeks for criminals. We
10:48:49 21 have a large criminal docket. Come back Friday. And so, they
10:48:56 22 can't handle the case that's going to run more than a week.

10:49:01 23 So what I can do is bring in a retired judge -- not
10:49:10 24 retired but senior. Generally they're from Louisiana, can be
10:49:19 25 from Mississippi. And this case has enough romance where they

1 might take it. When they see the volume, they may not. But
2 anyway.

3 So let's do that within a week, I want letters okaying
4 a stipulation for seven and five. And as I say, I loved it seven
5 and five as a defense lawyer because when you get eight, you
6 still get four strikes. When you get nine, 10, or 11, or 12, you
7 get less strikes. Works out good. It works out well.

8 Are y'all through with discovery?

9 MR. COX: We're close, your Honor. We have a few
10 depositions that we've agreed by -- to extend past the schedule a
11 bit, but we're really close.

12 THE COURT: Yeah, well, those are your dates.

13 MR. COX: Yes, sir.

14 THE COURT: Only time I get involved is when y'all get
15 a fuss and John puts them in a room with a key over there, and
16 when they undo their fuss, they get to go home. So y'all don't
17 need to fuss. Okay.

18 Okay. So I don't want to waste your time, so let's go
19 through these three motions that I've got pending. I have
20 sped-read them, even though one of them just was filed yesterday.
21 Thanks, by the way. So let's start with the Plaintiff Sisoian.

22 MS. GLAUSER: Did your Honor have a preference on which
23 motion to address first?

24 THE COURT: Well, the motion to exclude Sisoian from
25 testifying with regard to damages.

1 MS. GLAUSER: Your Honor's original order instructed
2 the parties to file a report if any witness was going to offer
3 opinion testimony. And following that order --

4 THE COURT: Well, I didn't say file it. I said if you
5 have an expert, you've got to serve that report by a specific day
6 in the scheduling. I don't want to see it until trial because it
7 indicates it's going to -- I mean, look at your files.

8 MS. GLAUSER: No. Apologies, your Honor. It was
9 served. And so, in accordance with that order, we served a
10 report. It is not an expert report. It was served to identify
11 that the plaintiff would be offering lay opinion testimony under
12 Rule 701.

13 And the three areas upon which Mr. Sisoian will be
14 offering that lay opinion testimony are within his personal
15 knowledge; they are inferences that are rationally based on that
16 personal knowledge; and they do not require specific or
17 specialized scientific or technical knowledge.

18 THE COURT: So tell me what they are because it sounds
19 just like the people I've been excluding: because they're going
20 to testifying as to the value of their company and the loss.

21 MS. GLAUSER: There are three areas, your Honor, one of
22 which is, in fact, Mr. Sisoian's opinion regarding the value of
23 his company. But under the advisory committee rule to Rule 701,
24 it specifically adopts the majority rule that allows an owner or
25 a founder of a company to offer, based on his or her personal

1 knowledge, the valuation that they placed on the company.

2 Now, of course, that will be subject to
3 cross-examination, and in our opinion, it will be supported by
4 expert opinion regarding damages valuation. But here, we are not
5 offering Mr. Sisoian's testimony as expert opinion as a valuation
6 regarding Objectiva. We are, instead, offering it as his lay
7 opinion, based on his 35 years working in the telecommunications
8 industry and as a technology special -- as a sales tech --

9 THE COURT: I understand from the motion that he has no
10 experience whatsoever in the, what is it, not the trade secret
11 but the makeup of the formula, the stuff that runs his valuable
12 company that never made a dime and never got on into business.

13 MS. GLAUSER: It's true, your Honor, that he is not the
14 person who wrote the code for it, but there are oftentimes
15 businesses where the founder or the owner of the business is
16 capable of hiring their engineering team that does that work, is
17 personally knowledgeable about the amount of time, effort and
18 money that is spent in developing the product that is source
19 code, or includes the source code, who is responsible for
20 developing the business plan and marketing plan and doing the
21 industry research that would indicate to that businessowner
22 whether the pursuit of this product or the development of the
23 software or source code is a worthy investment for them.

24 And that is the perspective from which we would be
25 offering Mr. Sisoian's lay opinion on the value of this product:

1 Why he pursued it and how he pursued it.

2 THE COURT: Now, it's my understanding -- tell me if
3 I'm wrong -- that that company never was commercially viable.

4 MS. GLAUSER: It -- no. You're correct, your Honor.
5 Eventually, the company was dissolved, but in that time, he had
6 negotiations with other companies that did express desire and
7 want and benefits regarding the product that it was -- that
8 Objectiva was developing; and, in addition to that, it obviously
9 has some value considering that Francis Anderson took it with him
10 to IBM, and there is almost no dispute in this case that he used
11 it at IBM, and IBM knows that it was used.

12 THE COURT: Well, now you're crossing the bridge a
13 little bit.

14 So tell me, again -- and I'm very familiar with the
15 writings of those folks that know so much. But I'm also pretty
16 familiar with expert testimony. So what is he going to testify
17 with regard to damage? What is -- for example, his value of this
18 company that never operated and that he didn't even take it -- he
19 asked somebody else to take it.

20 MS. GLAUSER: He is not going to offer a dollar figure.

21 THE COURT: Well, what is he going to offer? That's
22 what the main thing is before -- so I can kind of decide what
23 you're going to do so that you can try the case in a week.

24 MS. GLAUSER: Mr. Sisoian will be offering testimony
25 that shows that this source code software and know-how would have

1 been valuable within the market, that it would have solved a
2 long-felt need within particularly the telecommunications
3 industry.

4 THE COURT: And would be subject to the
5 cross-examination that it never was, it never did and --

6 MS. GLAUSER: Absolutely.

7 THE COURT: Okay. Is he going to put a value on it?

8 MS. GLAUSER: He is not.

9 THE COURT: Okay. All right. That helps me.

10 MS. GLAUSER: He will testify to his personal knowledge
11 regarding, for instance, negotiations that he had with Lucent and
12 if dollar figures were exchanged in those negotiations, even if
13 they ultimately failed, what offers were made.

14 THE COURT: He may or may not. Okay. Go ahead. What
15 else for Sisoian?

16 MS. GLAUSER: The other opinion -- lay opinion that we
17 intend for Mr. Sisoian to offer would be that it would be
18 difficult to duplicate or recreate the Objectiva architecture,
19 software and source code, and that would be based on his personal
20 knowledge of the amount of time that it took his developers --

21 THE COURT: Even though he didn't create it and he's
22 not qualified in the code?

23 MS. GLAUSER: He oversaw his code developers in writing
24 it.

25 THE COURT: Well, sure. I oversee patents cases. I

1 can't any more tell you what the source code was than the man on
2 the moon.

3 MS. GLAUSER: No. But you can and could identify how
4 long it takes to -- it took his team to create that product, how
5 much money it took, how difficult the process was, and thus, his
6 opinion that the ability to duplicate this would have been a
7 difficult, time-consuming, and expensive venture.

8 THE COURT: For others to do it.

9 MS. GLAUSER: As it was for him.

10 THE COURT: Well, okay.

11 MS. GLAUSER: The third opinion, your Honor, is Mr.
12 Sisoian's knowledge that in the industry, this particular
13 architecture was not generally known, and that would be based on
14 his familiarity within the industry of what outstanding need
15 there was for this product. If the particular architecture that
16 allowed you to develop this telecommunications business solution
17 package had already existed, then Mr. Sisoian would not have
18 undertook the founding of Objectiva, and the difficult and
19 lengthy process of developing the Objectiva architecture and
20 software.

21 Those are the three opinions that we intend for Mr.
22 Sisoian to offer, not based on scientific or technical knowledge.
23 Simply based on his personal knowledge, what he experienced and
24 what he knows from his time in the industry.

25 THE COURT: So he doesn't know the code, he's not

1 familiar with it, but he's going to testify that it would have
2 helped other -- I mean, I'm not catching on to.

3 MS. GLAUSER: Although he didn't write the code, I
4 think he is familiar with what the software was capable of doing,
5 how the code that was written would have been used, and what
6 benefit it would have offered.

7 THE COURT: Okay.

8 MS. GLAUSER: He was absolutely the salesperson that,
9 for instance, went to Lucent and discussed with them the
10 potential of them buying the product. As a result, he would have
11 known and does know what the product was capable of doing, even
12 if he wasn't the person who technically wrote the source code
13 that allows it to function in that way.

14 THE COURT: Well, okay.

15 MR. COX: Thank you, your Honor.

16 May it please the Court, we won't sort of repeat
17 arguments, hopefully too much, made in the brief on this, on
18 these three topics. I think it is helpful to hear for the first
19 time that Mr. Sisoian wouldn't be offering a dollar figure. That
20 was -- that's the first we've heard of that.

21 But the idea that he would offer testimony as to value
22 at all for a dissolved company that made no sales --

23 THE COURT: Well, you know, if I were you, I would love
24 for him to do that.

25 MR. COX: Understand, your Honor. And we appreciate

11:01:17 1 he's going to be a fact witness, but when he goes into questions
11:01:20 2 of value --

11:01:21 3 THE COURT: What is your position with regard to he is
11:01:23 4 the spokesman for the company, he tries to negotiate commercial
11:01:29 5 work for it, so he knows it well enough to know what the
11:01:31 6 architecture can do?

11:01:32 7 MR. COX: Your Honor, that's just -- that's not the
11:01:35 8 discovery record we have here at all. Mr. Sisoian was adamant in
11:01:38 9 his deposition that he knew nothing about the code, wasn't the
11:01:41 10 coder, put together the team.

11:01:43 11 THE COURT: She says he doesn't need to know that to
11:01:45 12 know the value.

11:01:46 13 MR. COX: But he does to have sort of the 701 knowledge
11:01:48 14 that they'd like to offer him for. If they want to put him on
11:01:51 15 the stand and say, I put together a team of people who really
11:01:54 16 know about that and then, put those people up, one a time, that's
11:01:57 17 one thing. But to sort of put it up as a spokesperson for value,
11:02:00 18 which is what they want to do, and say this was an important
11:02:03 19 product, even though nobody bought it and we had one negotiation
11:02:06 20 that fizzled quickly, the idea that he could sort of gather up
11:02:09 21 the knowledge of a team from ten years ago and speak on behalf of
11:02:13 22 all of these folks who actually know how to code isn't what 701
11:02:17 23 contemplates. That's not at all the situation.

11:02:20 24 THE COURT: Okay.

11:02:20 25 MR. COX: And --

11:02:21 1 THE COURT: So it sounds like I'll have to listen to
11:02:23 2 the testimony, one way or the other. But right now, it looks
11:02:28 3 like it would be crossable.

11:02:30 4 MR. COX: Your Honor, except for the idea of any
11:02:32 5 marketing --

11:02:32 6 THE COURT: I get a chance, too, every once in a while,
11:02:35 7 usually when I raise my hand.

11:02:39 8 That everything that's been said is -- can be handled
11:02:44 9 on cross-examination and anything on value can be objected to.
11:02:52 10 Okay.

11:02:54 11 MR. COX: Yeah. That's right.

11:02:56 12 THE COURT: Okay. Well, let me hear from the defendant
11:03:00 13 now on -- is it "Jarose"? "Jarose"?

11:03:07 14 MR. COX: Your Honor, I think it's Jarosz.

11:03:09 15 MS. GLAUSER: It rhymes with Paris, so it's Jarosz.

11:03:13 16 THE COURT: Jarosz.

11:03:15 17 MR. COX: Jarosz, okay. Thank you, your Honor.

11:03:19 18 Again, not to repeat what we've said in the papers, but
11:03:23 19 Mr. Jarosz relies heavily on this 80-20 split that somehow,
11:03:29 20 Francis Anderson is responsible for 80 percent of all the value
11:03:34 21 here. He had no independent work to sort of verify that 80
11:03:39 22 percent, and that's sort of our first criticism of that. The
11:03:42 23 idea that he can extrapolate from another expert, the percentage
11:03:46 24 of work attributable to a single employee is not what the rules
11:03:52 25 contemplate in terms of expert testimony.

11:03:54 1 THE COURT: Is Anderson going to testify?

11:03:57 2 MR. COX: He was deposed. He will either testify live
11:04:00 3 or by deposition.

11:04:01 4 THE COURT: And then, this Almeroth?

11:04:07 5 MR. COX: Yes, your Honor --

11:04:08 6 THE COURT: Takes the 80 percent and runs it across the
11:04:13 7 profits.

11:04:15 8 MR. COX: He does and Jarosz does that, as well. And I
11:04:18 9 think that's -- and he gets to numbers that are bigger than the
11:04:21 10 actual revenue, even if you assumed any of these products have
11:04:24 11 the source code, which they don't. Again, it's not a case where
11:04:29 12 they have shown or could show that any IBM product has the source
11:04:34 13 code at all. It doesn't.

11:04:35 14 THE COURT: Okay. Let's concentrate on Anderson. Tell
11:04:39 15 me who Anderson is and what you anticipate from his deposition.

11:04:44 16 MR. COX: Sure.

11:04:44 17 Anderson was the person who worked closely with Tom
11:04:47 18 Sisoian for some time. Sisoian then brought him with him to IBM.
11:04:51 19 They sort of separated then, but they had a sort of a long --

11:04:55 20 THE COURT: He was the custodian.

11:04:56 21 MR. COX: He was not the custodian. He was the --

11:04:58 22 THE COURT: But did he give it to somebody else?

11:05:00 23 MR. COX: To James Hartman. That's right, your Honor.

11:05:02 24 So Anderson is the principal author of the source code
11:05:06 25 of Objectiva. He testified about a variety of things that we'll

1 put forward in our summary judgment papers including that he
2 widely distributed the source code. He went to conferences as
3 one in 1998, in Illinois, where he transmitted the source code
4 beforehand, the conference that Mr. Sisoian knew about and allege
5 -- and told us at his deposition he approved. Anderson said at
6 his deposition, he sent that code to the organizer, no
7 restrictions of confidentiality, anyone could look at it, and
8 people did look at it outside of Objectiva.

9 Anderson said he is the person who, again, wrote most
10 of the code, took it with him when he left.

11 THE COURT: Well, if you publicly display in the patent
12 world, it's free gold. What is the theory here?

13 MR. COX: That's right, your Honor.

14 And this is one of those things that with the benefit
15 of extra times we had during this last year, we asked about that
16 1998 conference, in particular, and said, let's find everyone
17 from 20 years ago who attended and talked to him, and one of the
18 people who organized it had the source code from 20 years ago in
19 his files, way back when. And we asked him: Do you have a
20 confidentiality agreement? Any restrictions? No. He submitted
21 an affidavit on that. He was deposed on that by Sisoian's
22 counsel, and plain as day, he's had it for 20 years, has it
23 today.

24 So that's one of the things we've done with this extra
25 time is sort of find other ways why -- we believe and that we'll

1 be able to show that Mr. Sisoian can't satisfy the Bass factors,
2 including that he has to try to keep it secret. He has to take
3 reasonable precautions of keeping this from the public. And
4 you're absolutely right, Judge, that when it's publicly displaced
5 and, frankly, when it's not protected, whether it goes on the
6 internet or whatever, if someone doesn't do a reasonable job in
7 keeping it secret, that's the end of the analysis. It can't be a
8 trade secret.

9 And there's no dispute that Mr. Anderson sent to this
10 conference organizer the then-current version of the source code
11 as of May 1998, and we think that ends the analysis as to whether
12 there has been disclosure or not.

13 So Francis Anderson lives in England, he's not subject
14 to the subpoena power. We took his deposition with an eye to
15 trial, and we'll cut that testimony down. He may end up being
16 live for us. Obviously we'll take the Court's direction in terms
17 of hours we have to spend. But he is a relevant witness, rather
18 live or by deposition.

19 And we think he's going to be very helpful to the IBM
20 position, even though he was dismissed by IBM. He said, I
21 considered myself -- I certainly didn't consider Tom Sisoian the
22 author of the source code, because I wrote it, and if anyone owns
23 it, it's me. That's a whole other sort of story to tell. But
24 this public disclosure point and sort of whether that's --
25 whether that affects the Bass factor of trade secrecy, I think,

1 is probably the most relevant thing that Francis Anderson has to
2 say.

3 THE COURT: Well, I think that's helpful for my
4 preparation, but let's get back to Jarosz.

5 MR. COX: Right. So, again, this 80 percent number is
6 very problematic. And, again, the other big argument with Jarosz
7 is that the numbers he has are actually greater in terms of what
8 he claims to be Sisoian's loss, are greater than the actually
9 revenue numbers from IBM sales of products that don't include the
10 source code of this product.

11 So this is sort of a "how is this going to help the
12 jury." Obviously these are cross points. We can make a lot of
13 this point in terms of the actual numbers IBM had. But whether
14 he should even be allowed to say those numbers to the jury speaks
15 to the Court's gatekeeping role, whether he's going to offer
16 testimony that would be even helpful, assuming that's right,
17 because it's not based in science. It's not based in the
18 empirical evidence that IBM has provided to Mr. Sisoian of actual
19 sales.

20 Again, we dispute liability because there's no evidence
21 of source code in any of these products. But even if he's right
22 that somehow these products are implicated, the numbers he has
23 just don't match up.

24 MS. GLAUSER: Your Honor, Mr. Gervey, with permission,
25 is going to respond.

11:09:20 1 THE COURT: Sure.

11:09:32 2 MR. GERVEY: Thank you. Good morning, your Honor.

11:09:33 3 THE COURT: Good morning, we've still got 50 minutes.

11:09:37 4 MR. GERVEY: If I could, your Honor, quickly, this
11:09:40 5 isn't germane, I think, to our discussion with Mr. Jarosz, but we
11:09:43 6 can't let IBM's characterization of what happened at the 1998
11:09:46 7 conference go unchallenged. So if I could briefly comment on our
11:09:50 8 position about what happened with Mr. Anderson and the
11:09:53 9 conference.

11:09:53 10 THE COURT: Please.

11:09:56 11 MR. GERVEY: So in advance of the conference, Mr.
11:09:59 12 Anderson did send some source code to a conference organizer who
11:10:04 13 has come forward with it. That person is also IBM's paid
11:10:08 14 consulting witness in this case who is paid for the declaration
11:10:11 15 that they signed, stating that they have the source code.

11:10:14 16 THE COURT: That's just cross-examination.

11:10:17 17 MR. GERVEY: And critically, your Honor, the source
11:10:19 18 code that was sent to him does not disclose all of the trade
11:10:23 19 secrets. It's not the complete source code that's at issue in
11:10:25 20 this case. There is no indication that that source code was sent
11:10:31 21 to him for any purpose than to put on a computer so that Mr.
11:10:34 22 Anderson could operate the software and display it at the
11:10:37 23 conference and talk about it.

11:10:39 24 There's no evidence that person further distributed the
11:10:42 25 source code to anyone.

11:10:43 1 THE COURT: What difference does it make? You say that
11:10:47 2 you wouldn't have an instruction that any part of the source code
11:10:51 3 that was publicly displayed, for any reason, is in the public
11:10:56 4 domain and cannot be the issue of damages?

11:11:01 5 MR. GERVEY: So there is no indication that anything
11:11:04 6 that we have claimed that's trade secret was, in fact, displayed
11:11:07 7 at the conference.

11:11:09 8 So Mr. Anderson did discuss the software at the
11:11:12 9 conference. Mr. Anderson pub -- there is a paper that was
11:11:14 10 published following the conference that discusses the software;
11:11:18 11 however, we are not claiming the information in that paper as
11:11:22 12 trade secret. There is other information, there are other
11:11:26 13 sections of the code, the way that those sections that remain
11:11:30 14 secret interact with what is public.

11:11:32 15 THE COURT: So part of -- you know, you weren't here,
11:11:36 16 but I was trying to get, at one point in time, for them to
11:11:40 17 explain to me what the trade secret was because they said they
11:11:43 18 didn't know, said they did. You've said it was 500 pages and
11:11:49 19 they said whatever.

11:11:52 20 So now, on something that I have no definition in, you
11:11:55 21 say part of it if it's disclosed is meaningless and part of it is
11:12:01 22 not. Is that what you're telling me?

11:12:04 23 MR. GERVEY: Your Honor, I think our position is that
11:12:05 24 the case law supports the idea that the combination of --

11:12:08 25 THE COURT: Don't worry about the case law --

11:12:10 1 MR. GERVEY: -- public -- sure.

11:12:12 2 THE COURT: -- that's my job.

11:12:13 3 MR. GERVEY: Yes.

11:12:14 4 So, your Honor, we have three -- identified two
11:12:19 5 discrete collections of source code that we are claiming as trade
11:12:23 6 secret. And it is our position that the trade secrets within
11:12:27 7 that source code, not all of them -- we are not claiming anything
11:12:31 8 as trade secret that was discussed at the conference. And --

11:12:35 9 THE COURT: And how do you extrapolate it? I mean, how
11:12:38 10 do you -- you have what went to the conference?

11:12:42 11 MR. GERVEY: We do have what went -- we have what was
11:12:45 12 at the conference, but there's no evidence of what was actually
11:12:47 13 shown at the conference. The only evidence is that this person
11:12:50 14 received the code as a conduit to put on the computer so that
11:12:54 15 Anderson could run the software and discuss the software at the
11:12:57 16 conference. There is no evidence -- no witness, not Anderson,
11:13:01 17 not the person who found the code, no one could identify a
11:13:05 18 single, discrete piece of software or a source code that was
11:13:08 19 discussed at the conference.

11:13:12 20 And there is testimony -- there will be expert
11:13:15 21 testimony that the size of the source code is such that it was
11:13:18 22 not permissible or possible to discuss all of it in one session,
11:13:21 23 on one day at a conference.

11:13:23 24 THE COURT: Well, whether it was discussed or not, I'm
11:13:26 25 trying to get in my mind, did all of the source code go and then,

1 only part of it, you're saying, got on discussion? Or just part
2 of it could have been publicly and the other part not?

3 MR. GERVEY: Correct, your Honor. There may be some
4 that was discussed at the conference, but no one can identify
5 what that is. But to counter IBM's point, the code itself was
6 not distributed at the conference. There's no evidence that
7 anyone received it or took copies home. It was contained on the
8 computer on which it was displayed.

9 THE COURT: Well, I just had a case where you had
10 confidentiality agreements on surgical patents, and one of the
11 things that wasn't covered in the confidentiality was the
12 surgical procedure itself. So they showed the surgical procedure
13 and it wasn't protected. So I held it was publicly in the public
14 realm because other people saw the surgical procedure, doctors
15 and pharmaceutical people. And you can check that in the Fifth
16 Circuit, it got upheld. It got in the public domain.

17 And you're saying this went -- could have gotten in the
18 public domain, but your evidence is that it didn't.

19 MR. GERVEY: I think there's no evidence that anything
20 was in the public domain beyond the scope of the paper. We have
21 addressed that by not claiming anything as trade secret that is
22 in the paper that was published subsequent to the conference,
23 your Honor.

24 THE COURT: Okay. All right. How about your economic
25 person, Jarosz?

11:15:36 1 MR. GERVEY: Yes. Thank you, your Honor, your Honor.
11:15:41 2 I'd like to discretely address the two points brought by IBM's
11:15:46 3 counsel.

11:15:46 4 First, looking at Mr. Jarosz's apportionment opinion of
11:15:49 5 at least 80 percent, this opinion is based on sound economic
11:15:52 6 analysis.

11:15:55 7 THE COURT: Tell me what it is and I'll make a decision
11:15:58 8 if it's sound.

11:16:00 9 MR. GERVEY: Very good, your Honor.

11:16:01 10 So he is opining that appropriate apportionment here
11:16:04 11 is at least 80 percent, and he is doing this based on input from
11:16:08 12 our technical expert, Professor Almeroth, which he considers, in
11:16:12 13 light of the record. And the things that he evaluated include
11:16:15 14 the benefits -- whether the trade secrets provide the benefits
11:16:19 15 that drive the sales of the IBM products at issue, whether -- he
11:16:24 16 elaborates that he discussed the benefits in this product with
11:16:27 17 Mr. Francis Anderson.

11:16:30 18 He looks at IBM marketing documents, and he
11:16:33 19 specifically considers that the WSDLs and XSDs, which are
11:16:36 20 components of the IBM product, are the most innovative or
11:16:39 21 creative of the trade secrets. He considers that the messaging
11:16:42 22 model, which is the most important feature of the software -- the
11:16:45 23 IBM product, was created with the trade secrets. He considers
11:16:48 24 that five out of seven key features were fully or substantially
11:16:52 25 enabled by the trade secrets. These are the shared information

1 data model and telecom service models within the IBM product. He
2 excludes from consideration the e-TOM standard as implemented by
3 Mr. Chandrasekaran, who is another IBM employee.

4 IBM never deposed Mr. Jarosz on these opinions. They
5 were issued after his deposition. These sections of his reports
6 are not cited in IBM's motion. Jarosz considers all of this
7 evidence, and he considers the technical opinion, in light of
8 this economic evidence. And additional evidence, including the
9 IBM's product team made de minimis contributions to the product
10 at issue --

11 THE COURT: Whoa, whoa, slow down a little bit.

12 MR. GERVEY: Yes, your Honor.

13 And that there was no alternative that was capable of
14 providing the benefits of the trade secret. So he looked at all
15 -- he looked at the full record and considered the technical
16 valuation, in light of that, and then, issued his apportionment
17 analysis. So it is an economic opinion --

18 THE COURT: Eighty percent of all profit. So there was
19 only 20 percent equity in the work in all of this stuff? You're
20 going to have a jury believe that?

21 MR. GERVEY: That 80 percent of the profit is he is
22 submit -- has submitted, I believe, economically justified
23 opinion that 80 percent of the profit is attributable to the
24 trade secrets.

25 THE COURT: The part you selected. Come on, you guys

11:18:17 1 need to settle this case. Go ahead.

11:18:20 2 MR. GERVEY: Very good, your Honor.

11:18:21 3 As to the application of that apportionment to the
11:18:24 4 other revenue of timing sales, Mr. Jarosz's economic model, the
11:18:30 5 intuition works like this, if I can have a moment to explain it.
11:18:35 6 The intuition is that if the trade secrets were to result in 80
11:18:38 7 percent of the sales looking at the units sold, those sales would
11:18:42 8 still drive sales of other -- the other IBM timing products such
11:18:46 9 that it's appropriate to include the revenue from those, and in
11:18:49 10 that way, the 80 percent is passed through to the other products.
11:18:53 11 That is the economic -- that fits within the economic model that
11:18:55 12 he's described.

11:18:56 13 THE COURT: Yeah, well, I'll hear him. But let's -- 80
11:19:04 14 percent and then, figure that it's going to be a catalyst to all
11:19:08 15 of the other sales that he doesn't have any information about is
11:19:11 16 a little queasy.

11:19:15 17 MR. GERVEY: Your Honor, if I --

11:19:16 18 THE COURT: I'm not making a decision right now.

11:19:19 19 MR. GERVEY: Thank you, your Honor.

11:19:19 20 THE COURT: Sounds to me like that we're going to hear
11:19:26 21 Mr. Jarosz's testimony before he gets on the stand. But that's
11:19:32 22 all right.

11:19:33 23 Okay. So as long as you're up there, tell me -- I've
11:19:35 24 got three of them. Jarosz's, Sisoian. Who is the fellow that I
11:19:46 25 just got yesterday?

11:19:48 1 MR. COX: Easttom.

11:19:50 2 MR. GERVEY: Easttom.

11:19:53 3 MR. COX: Judge, it's Charles Easttom.

11:19:55 4 MR. GERVEY: Charles Easttom.

11:19:57 5 Your Honor, in terms of responding to Easttom, we've

11:20:03 6 actually asked IBM for an extension to respond to that motion.

11:20:06 7 We've just received it on Monday evening. And we're in the midst

11:20:09 8 of responding to 20 summary judgment motions in another matter

11:20:12 9 that is ongoing, and we have attorneys traveling of the office in

11:20:17 10 deposition.

11:20:18 11 THE COURT: You know, that's fine. I'm busy, too. But

11:20:21 12 you're here and I'm here, and I'm going to not see you again

11:20:26 13 until jury selection.

11:20:27 14 So why don't you tell me, if you're going to put him on

11:20:29 15 the stand, you ought to have a pretty good idea what he's going

11:20:36 16 to say.

11:20:36 17 MR. GERVEY: Fair enough, your Honor.

11:20:37 18 Your Honor Mr. Easttom is going to testify to his

11:20:40 19 in-depth analysis of the source code of -- plaintiff's source

11:20:44 20 code, his comparison of plaintiff's source code to the IBM -- to

11:20:51 21 what Mr. Anderson used at IBM, and as well as critically, he's

11:20:56 22 going to offer a comparison of the structure of plaintiff's

11:20:59 23 source code to the structure of the IBM product. And Mr. Easttom

11:21:02 24 has identified several sections of the IBM product itself, aware

11:21:07 25 of the structures -- they're written in different languages. But

1 the structure of the source code as he has set forth has mirrored
2 the structure of the Objectiva source code.

3 THE COURT: Well, now, they say he didn't compare them
4 with the source code that you're suing over.

5 MR. GERVEY: It is in different languages. But we have
6 and in Mr. Easttom's opinion is that there are identifiable
7 structures in the IBM source code that are comparable to the
8 structures in our source code. And so, they have -- IBM has
9 repeatedly stated that this is not a direct copy case. That's
10 true in the sense that the languages aren't the same, but we have
11 evidence that the structures from our code are present in the IBM
12 product, and some of Mr. Easttom's testimony pertains to that.

13 THE COURT: Okay. I'm not sure I understand. It's
14 either he did or he didn't compare them, or he did compare them
15 but it was his opinion understanding both source codes that
16 they're similar, or the same, or copied, but he didn't read the
17 source code of the.

18 MR. GERVEY: Your Honor, he reviewed the source code of
19 the IBM product and he reviewed the source code of plaintiff's
20 product, and in one of his opinions, it makes a comparison
21 offering the opinion that the structures from plaintiff's
22 Objectiva code are, in fact, in the Objectiva product. He offers
23 other comparisons between other code bases, including a
24 comparison between what is in plaintiff's code and the tool that
25 Mr. Anderson created and used at IBM using plaintiff's source

11:22:59 1 code.

11:22:59 2 So there's two uses at IBM. One is, Mr. Anderson
11:23:03 3 created this tool at IBM using plaintiff's source code. The
11:23:08 4 second is he imported structures from that source code, and those
11:23:11 5 structures are in IBM's product itself. And plaintiff -- and Mr.
11:23:15 6 Easttom tends to -- intends to testify as to his analysis of
11:23:19 7 both.

11:23:20 8 THE COURT: All right.

11:23:24 9 MR. COX: Thank you, your Honor.

11:23:27 10 During Mr. Easttom's deposition, one of the questions
11:23:33 11 we asked him was whether he thought it would be a good idea to
11:23:35 12 compare to this publicly distributed source code from the
11:23:39 13 University of Illinois in mid-1998. He said that would be the
11:23:43 14 perfect comparison to look at sort of what was publicly disclosed
11:23:46 15 and what wasn't. He didn't do that. He didn't look at all as to
11:23:49 16 what was actually sent out in the public.

11:23:51 17 That's one of the arguments we have about --

11:23:53 18 THE COURT: Wait a minute, who sent it out to the
11:23:54 19 public?

11:23:55 20 MR. COX: That Francis Anderson and Objectiva. And Mr.
11:23:58 21 Sisoian, again, testified he knew full well what was going to
11:24:01 22 that conference in terms of materials.

11:24:03 23 THE COURT: Now you're backtracking on me.

11:24:09 24 So the source code that went to the public disclosure
11:24:13 25 alleged, the expert didn't check it.

11:24:22 1 MR. COX: That's right, your Honor. That's right.

11:24:24 2 THE COURT: So he didn't -- okay.

11:24:25 3 MR. COX: That's right. So that's the May 1998

11:24:27 4 disclosure at the University of Illinois.

11:24:28 5 And, again, this is not our burden to prove what might
11:24:32 6 be left as a trade secret. The entire source code was

11:24:35 7 transmitted without confidentiality, and this guy's had it for 19
11:24:40 8 years and never been asked for it back. Others may have it, too.

11:24:43 9 But it's not IBM's burden to sort of distinguish as parts of the
11:24:48 10 code what was publicly available and what was not. It's the
11:24:51 11 plaintiff's burden to come forward and say, this was a true
11:24:54 12 secret, and they can't do that.

11:24:56 13 Again, Mr. Yoder has no connection to Objectiva. No
11:25:00 14 confidentiality agreement. It's not enough to say the trade
11:25:04 15 secret is everything else except what was publicly disclosed.
11:25:07 16 It's the plaintiff's burden under Bass to come forward with
11:25:11 17 something stronger than that.

11:25:13 18 And more to the point on Mr. Easttom, he has a variety
11:25:15 19 of opinions which we've set forth in the brief in terms of
11:25:19 20 know-how. This was one of Mr. Sisoian's alleged trade secrets,
11:25:22 21 not just the source code but the know-how with these source code
11:25:26 22 and the software, didn't look at the know-how, has no opinions
11:25:30 23 about that.

11:25:30 24 And a lot of that, your Honor, we're just trying to
11:25:33 25 keep from the jury at all because we know what he did and we know

1 what Mr. Easttom didn't do, in terms of comparing to what was
2 publicly available and has been for the last 19 years. We want
3 to really cabin his testimony to things that speak to the
4 ultimate issues in the case.

5 MR. GERVEY: Your Honor, with permission, I'd like to
6 respond very briefly.

7 THE COURT: Sure.

8 MR. GERVEY: Your Honor, as our forthcoming response
9 will demonstrate, Mr. Easttom compared what was allegedly
10 disclosed to the person who was responsible for putting the code
11 on the computer at the conference. He compares in detail that
12 version of the source code to many versions of the source code
13 that were in plaintiff's possession, both before and after the
14 conference, establishing significant differences in the source
15 code.

16 So it is our view that -- and his opinions on --
17 regarding those comparisons are well-reasoned and admissible in
18 this case. But as a factual matter, it is incorrect to state
19 that he did not make those comparisons when, in fact, he did.

20 THE COURT: Took me around the rosie there. He didn't
21 compare the actual source code that went out to the conference,
22 but he compared other source codes that are supposedly similar.
23 Is that what you're telling me?

24 MR. GERVEY: Your Honor, he took the source code that
25 in terms of going to the conference was present at the

1 conference. He took those -- that source code and compared it to
2 plaintiff's code and not only one version of that code but many
3 versions of it. Also, there were additional two years of
4 development, nearly two years that went on after the conference
5 in which there is new source code that is developed following the
6 conference that could not have been disclosed, and he compared it
7 to all of that code.

8 So it is incorrect to say he didn't take the code that
9 was at the conference and compare it to plaintiff's code. He
10 conducted numerous pages of that specific comparison, in fact,
11 has an entire report addressing that question, and that will be
12 laid out in our forthcoming response, your Honor.

13 THE COURT: All right. Counsel, y'all have been
14 patient. I appreciate it. Every little bit of preparation
15 before y'all get here to select the jury is helpful. I still
16 think the same thing I've told you the last two times you've been
17 here. Of course, there have been different lawyers that may have
18 seen the tide come in and didn't want to be on the ship. I don't
19 know why, but there's been a bunch of lawyers in and out of this
20 case. Still a case I think on behalf of the plaintiff ought to
21 be settled.

22 And I will let you go home with those remarks.

23 MR. GERVEY: Thank you.

24 (End of proceedings.)
25

* * * * *

UNITED STATES DISTRICT COURT)
WESTERN DISTRICT OF TEXAS)

I, LILY I. REZNIK, Certified Realtime Reporter, Registered Merit Reporter, in my capacity as Official Court Reporter of the United States District Court, Western District of Texas, do certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

I certify that the transcript fees and format comply with those prescribed by the Court and Judicial Conference of the United States.

WITNESS MY OFFICIAL HAND this the 24th day of July, 2017.

/s/Lily I. Reznik
LILY I. REZNIK, CRR, RMR
Official Court Reporter
United States District Court
Austin Division
501 W. 5th Street, Suite 4153
Austin, Texas 78701
(512)391-8792
Certification No. 4481
Expires: 12-31-18

LILY I. REZNIK, OFFICIAL COURT REPORTER
U.S. DISTRICT COURT, WESTERN DISTRICT OF TEXAS (AUSTIN)